No. 14,452

IN THE

United States Court of Appeals

For the Ninth Circuit

JERRY ALLEN NILES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 3231, and Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on January 20, 1954 for, in violation of 50 United States Code Appendix 462(a), failing to comply with the order of his Local Draft Board to report to a place of employment for the purpose of doing civilian work contributing to the maintenance of the national health, safety or interest as provided for in the Selective Service Act of 1948

and the rules and regulations made pursuant thereto (R. 3, 4).

Appellant plead not guilty and was tried by the Court, the Honorable Michael J. Roche presiding, on May 11, 1954 (R. 6, 8). A motion for judgment of acquittal was made and denied by the Court (R. 35). Appellant was found guilty and sentenced to a term of eighteen months on June 17, 1954 (R. 11, 36). Appeal was timely made to this Court from the judgment of conviction (R. 13).

FACTS.

Appellant registered for Selective Service on September 2, 1949 (File 1). On January 8, 1952 appellant was classified I-O (File 13). On October 20, 1952 appellant was informed that Selective Service regulations provided that Class I-O registrants could be ordered to perform civilian work contributing to the maintenance of the national health, safety or interest, and was given an opportunity to volunteer for one of the available positions (File 81). On February 24, 1953 appellant was asked to indicate his preference with respect to three jobs which had been approved for the employment of conscientious objectors (File 90). Appellant informed the Board that he did not wish to perform any of the type of work listed (File 90). He said, among other things, that the wages that are offered are "entirely unsatisfactory they offer less than half of what I am receiving now." (File 93).

Mr. Niles was ordered to report to his Local Board on March 31, 1953 for an interview (File 96). On March 30, 1953 the Local Board received what Appellant termed "statement of my position (File 97-102)." On page three (File 100) of this statement appellant listed four objections to civilian work in lieu of induction:

"(1) it is *un*constitutional, in that it demands that a person be forced into *un*savory occupations, because of a conscientious abhorrence of war."

"(2) The three 'jobs'(?)[1] offered are not as stated in the '*national* health, safety, and welfare' * * *"

"(3) The type of employment offered is insulting to any intelligent person, being occupations for indigents, 'skid-row bums' and mental incompetents."

"(4) The salary offered is also an insult to a person with my training and education * * *"

Appellant summarized his position at Page 5 of this communication (File 102). He stated (1) that he would never voluntarily give up his present classification, (2) that "the 'jobs'(?)[1] offered by the Local Board are entirely unsatisfactory and insulting in type, in place and in salary. And I for one will not be forced into any of those positions come what may" and (3) "The federal government is not giving me anything that I am not paying for, as far as I am scripturally able." Appellant was at that time employed as a lath worker.

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[1]So written in file.

On March 31, 1953, appellant had an interview before the Local Board (File 104). When asked concerning work as an Institutional Helper in the Department of Charities in Los Angeles, he stated that he did not believe in that type of charity and that "he explained his reasons for refusing the work in his letter that was submitted to the board on March 30, 1953 (File 104)." He stated that primarily "he felt he was being forced into an unsavory job and he saw no value in the jobs offered."

On August 24, 1954 appellant was ordered to report for instructions to proceed to his place of employment for civilian work contributing to the maintenance of the national health, safety or interest, and was assigned to the Department of Charities, 110 North Mission Road, Los Angeles 33, California (File 161). Appellant failed to report for civilian work as directed (File 161). The Local Board, on September 4, 1953, received a letter from appellant in which he stated "I refuse both the job as an Institutional helper in Los Angeles and any subsequent offers of employment by the government in my own city or anywhere else (File 172)."

QUESTIONS PRESENTED.

I. Are the present provisions of the Selective Service Act concerning civilian work for conscientious objectors in violation of the Constitution of the United States?

II. Could the local board constitutionally determine that work at the Los Angeles County Department of Charities was in the national health, safety or interest?

III. Do the cases holding that the 1940 Selective Service Act provisions concerning civilian work for conscientious objectors constitutional apply to the provisions of the present act?

SUMMARY OF ARGUMENT.

I. INTRODUCTION.

The question presented in this case is whether the present Selective Service Act provisions concerning civilian work for conscientious objectors so differ from the provisions under the 1940 Act that the court must re-examine the question of the civilian work program's constitutionality.

II. APPELLANT WAS ASSIGNED TO WORK OF NATIONAL IMPORTANCE.

The fact that the work involved in the instant case benefits the state of California does not necessarily mean that this work does not benefit the United States. Since Los Angeles is a part of the United States, any benefit to it is a benefit to the nation as a whole. Any work in the interest of Los Angeles would, therefore, inure to the benefit and be in the national interest. Appellant, in any event, cannot set himself up as a judge as to what constitutes national importance. That job is one in the discretion of the Selective Service

System and the administrative interpretation should be upheld unless clearly erroneous. The fact that appellant's work would be administered by a subdivision of the state does not mean that the work itself cannot contribute to the national interest. The Selective Service Act authorizes the utilization of state subdivisions in the administration of the act. Such an authorization is not unusual or unconstitutional. The work here involved may be in the national interest in providing full utilization of critical manpower, resources and benefit national and military morale by requiring appellant to be of some use.

III. APPELLANT WAS NOT ORDERED INTO INVOLUNTARY SERVITUDE.

The action of the local board was constitutionally authorized under the war power. Work of a like character has been held not to involve involuntary servitude by the courts under the 1940 Act.

IV. THE ORDER DID NOT DEPRIVE APPELLANT OF DUE PROCESS OF LAW.

The courts have uniformly rejected this argument under the 1940 Act. Appellant has shown no distinction between that Act and the present one causing any prejudice to appellant. On the contrary, under the present Act, pay and conditions of labor are better, and appellant may remain at large instead of being confined to a camp.

V. THE SELECTIVE SERVICE ACT IS NOT UNCONSTITUTIONAL AS AN UNLAWFUL DELEGATION OF POWER.

The delegation under the 1940 Act was not held to be unreasonable. The present act defines the program in much greater detail than that of the Act of 1940 a fortiori. Since the past act was constitutional, the present one is. Furthermore, civilian work under the war power requires a flexible program and lends itself admirably to administration regulation.

VI. APPELLANT WAS NOT ORDERED TO WORK IN A GAMBLING HALL.

Appellant strenuously argues that the present regulations would allow appellant to be assigned to work at a Nevada gambling hall. The fact of the matter is that appellant wasn't. Appellant has no standing to raise this question.

STATUTES AND REGULATIONS.

Section 5(g), Selective Training and Service Act of 1940 (54 Stat. 889)

> "* * * Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction * * *"

Section 456(j), Universal Military Training and Service Act of 1948

"(2) If the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

Section 1 (e), Universal Military Training and Service Act of 1948

"The Congress further declares that adequate provision for national security requires maximum effort in the fields of scientific research and development, and the fullest possible utilization of the Nation's technological, scientific, and other critical manpower resources."

Section 10 (b), Universal Military Training and Service Act of 1948

"The President is authorized—(5) to utilize the services of any or all departments and any and all officers or agents of the United States, and to accept the services of all officers and agents of the several States, Territories, and possessions, and subdivisions thereof, and the District of Co-

lumbia, and of private welfare organizations, in the execution of this title;"

Selective Service Regulation 1660.1

"Definition of Appropriate Civilian Work.—(a) The types of employment which may be considered under the provisions of Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof. (b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

ARGUMENT.

I. INTRODUCTION.

Section 6 (j) of the Universal Military Training and Service Act of 1948 provides that conscientious objectors may be ordered by their local board to perform "such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate."

The Selective Training and Service Act of 1940 (54 Stat. 889) provides that those classified as conscientious objectors may "be assigned to work of national importance under civilian direction."

Appellant here argues that the Draft Act now in effect, as applied by the regulations and orders of the local board in pursuance thereto, is unconstiutional as applied to him, but apparently concedes that the 1940 Act was constitutional (Appellant's Brief, page 18). Appellant argues that assigning him to work for the Los Angeles Department of Charities puts him in a state of peonage and deprives him of due process of law. He further argues that the Selective Service Act constitutes an unlawful delegation of legislative authority violating the separation of powers principle of our constitution.

The civilian work program in lieu of induction under the 1940 Selective Service Act has been held constitutional by this and many other circuits. *Richter v. United States,* 181 F. 2d 591; *Penor v. United States* (9th Cir.), 167 F.2d 553; *Hopper v. United States* (9th Cir.), 142 F.2d 181; *Atherton v. United States* (9th Cir.), 176 F.2d 835; *Wolfe v. United States,* 149 F.2d

391; *Roodenko v. United States* (10th Cir.), 147 F.2d 752; *Kramer v. United States,* 147 F.2d 756; *Brooks v. United States,* 147 F.2d 134; *United States v. Van Den Berg,* 139 F.2d 654; *United States v. Mroz,* 136 F.2d 221. Under the 1940 Act conscientious objectors were assigned to civilian public service camps. See *Atherton v. United States, supra.* Under the present act conscientious objectors are allowed to remain at large but are required to work in such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate. Regulation 1660.4. The local board is limited by Regulation 1660.1 which provides as follows:

> "(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.
>
> "(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof."

In the present case appellant was assigned finally to work as an Institutional Helper in the Los Angeles Department of Charities (File 161). Appellant claimed that this job was entirely unsatisfactory and insulting in type, in place and in salary (File 102).

Appellant attempts to distinguish the present program of civilian work for the one held valid under the 1940 Act because the 1940 program operated through camps administered by, or at least to some extent dependent upon, the federal government, while appellant's work would be supervised by a subdivision of a state. Appellant claims that the work to which he was assigned was not national or within Congress' power to order.

II. APPELLANT WAS ASSIGNED TO WORK OF NATIONAL IMPORTANCE.

The United States is a federal republic. Its government consists of two spheres of authority—one, of the states, the other, of the national authority as defined and limited by the constitution. The states of the union, however, are not separate islands of interest and concern. The states together comprise the United States of America.

When Rhode Island, the smallest of the states, is injured, not only Rhode Island is injured but also the United States is injured. Rhode Island is a part of the United States just as the arm is part of the body. If the part is injured, the whole is injured. When California increases its wealth and happiness, the United States increases its wealth and happiness. Yosemite Park is within the state of California, yet its beauty belongs to the United States as a whole. When Los Angeles becomes a better place in which to live with less poverty and suffering, the United States, by that much, becomes better and richer.

When one works in the United States to promote health, safety, or interest, that work must benefit a part of the United States before it can benefit the whole. One cannot contribute to the national interest without contributing to the local interests of the place where the contribution is effected. When during World War II conscientious objectors worked on forestry and tree planting projects, they benefited the states in which those activities were carried out as they benefited the national interests. If appellant contributed to the alleviation of suffering in Los Angeles County, he would benefit both the national and the local interest. It is impossible to affect one without affecting the other. There is no place and nothing upon which appellant could work where his efforts could be directed wholly towards the national interest without influencing the interests of some particular state or subdivision thereof.

Perhaps appellant is arguing that the Los Angeles charities are not important enough to be considered national. Appellant, however, is not the person to make this judgment of policy. This Court has held that a Selective Service registrant cannot set himself up as a judge as to what constitutes national importance. *Penor v. United States* (9th Cir.), 167 F.2d 553; See also *Roodenko v. United States* (10th Cir.), 147 F.2d 752. Certainly the alleviation of social problems in Los Angeles would have some effect upon the ability of that city to contribute to a war effort. At least it is not unreasonable for an administrative agency so to find, and an administrative interpretation should be upheld unless clearly erroneous. *Bowles v.*

Seminole Rock and Sand Company, 325 U.S. 410; *F. Uri and Company v. Bowles* (9th Cir.), 152 F.2d 713; *Labor Board v. Atkins Company,* 331 U.S. 398, 403.

Appellant seems to be arguing that if a program is administered by state agencies it therefore cannot contribute to the national interest. However, the federal government has many times utilized state agencies to accomplish federal purposes. The state courts to some extent administer national law. Under the Selective Service Act itself, the President is authorized to utilize the services of all officers and agents of the several states and subdivisions thereof in the execution of the Selective Service law. Section 10(b)(5), *Universal Military Training and Service Act of 1948.* Pursuant to this authorization the Selective Service System has utilized the Los Angeles Department of Charities to accomplish what, in its judgment, is in the national interest. The fact that a bank cannot use the word "national" unless the bank is chartered by United States laws, seems rather irrelevant to the question whether charity for the county of Los Angeles contributes to the national interest.

Congress has declared its purpose in enacting the Universal Military Training and Service Act as, in part, that adequate provision for national security requires the fullest possible utilization of the nation's critical manpower resources. Section 1(e) *Universal Military Training and Service Act of 1948.* Mr. Niles' working for the Los Angeles charities may release a less scrupulous individual for work in making ma-

chines for the common defense. His work might aid the wife, widow or mother who lost her support with the death of one of those young men who are not too conscientious to fight. His work in rehabilitation might return a useful citizen to work in the national interest and forward the defense effort. See *Roodenko v. United States,* supra. It might even be said that appellant's work at a job paying the insignificant sum of $200 a month while living the life of a civilian might benefit the national morale even though his contribution was ever so slight to the national interest. At least the morale of those soldiers who are serving their country for as little as $90 per month might be improved by the knowledge that one who avoided their job was at least required to make some sacrifice, and was not continuing his civilian activities totally unencumbered by any obligations to his country. See *Brooks v. United States* (2nd Cir.), 147 F.2d 134, where the court, in referring to a civilian work program, said "It is enough that such action may have been considered needed during a great national emergency for its effect upon the morale of those who do serve in the armed forces."

III. APPELLANT WAS NOT ORDERED INTO INVOLUNTARY SERVITUDE.

Congress has the power to draft labor for civilian purposes. *Atherton v. United States,* supra, at 842. The proper maintenance of agriculture, civilian businesses, transportation, sanitation, health and other

civic activities are as essential to the successful prosecution of war and as much a part of the war effort as the production of munitions of war and the arming and equipment of military forces. *Roodenko v. United States,* supra.

Under the 1940 Act all courts have rejected the argument that the constitution did not authorize non-military work and that doing civilian work in the national interest was involuntary servitude. *Wolfe v. United States,* supra; *Weightman v. United States,* 142 F.2d 188, 191; *Brooks v. United States,* supra; *Atherton v. United States,* supra; *Hopper v. United States,* supra. Congress has, under the war power, broad authority to provide for the national defense. As was said in *Hirabayashi v. United States,* 320 U.S. 81, at page 93, "the war power is the power to wage war successfully and is not restricted to the winning of victories in the field; but extends to every matter and activity so related to war as substantially to affect its conduct and progress."

Work in the Los Angeles Department of Charities, as ordered by the Selective Service authorities, is no more involuntary servitude than an order to serve in the Army, Navy or Marine Corps. Congress, in its undoubted authority to provide for the common defense, has determined that appellant's services are necessary to that end. His exemption from service in the armed forces did not extend to a complete exemption from all duty to his country.

IV. THE ORDER DID NOT DEPRIVE APPELLANT OF DUE PROCESS OF LAW.

Appellant's argument that he had been deprived of due process of law by ordering him to accept a lower salary and work which is not as sympathetic to him as that in which he is presently engaged is without merit. The courts have uniformly rejected this argument under the 1940 Act. *Hopper v. United States,* supra. It cannot be said that the difference between the procedure under the 1940 Act and this one operates to appellant's prejudice. The present system allows him to remain at large while the 1940 Act confined him to a camp. Any differences between that act and the present one inure to his benefit. The pay is better and the conditions of labor more nearly that of the average civilian.

Under the Selective Service Act the Selective Service System is allowed to utilize the services of agents of local subdivisions. The use of a county agency is not contrary to the statute. As appellant realizes (Appellant's Brief, page 20) some camps during the 1940 Act were run by religious groups. The fact that under the present act county officers are used seems a distinction without important constitutional difference.

In the present case appellant was ordered to work for the County of Los Angeles which has been appointed pursuant to Section 10(b)(5) of the Universal Military Training and Service Act for the administration of that act. While it is admitted that there are instances in which the presumption of regu-

larity in the exercise of the war power b ythe President may be overcome, it is submitted that appellant has shown no evidence or reason why that action in this case should be held irregular or without the scope of the war power.

V. THE SELECTIVE SERVICE ACT IS NOT UNCONSTITUTIONAL AS AN UNLAWFUL DELEGATION OF POWER.

The 1940 Act contained a simple statement that conscientious objectors were to be assigned to work of national importance. The present act adds considerable detail to the provisions in the 1940 Act while keeping its governing purpose and philosophy. (Compare the two statutes copied in this brief.) In referring to the 1940 Act the Court of Appeals for the Tenth Circuit stated "it was not necessary for the act to define in detail the organization which was to be created. It was sufficient to designate the framework within which it was to be confined." *Roodenko v. United States,* supra. This Court has observed that no practical breakdown as to what would be work of national importance could be written into the Selective Service Act. *Atherton v. United States*, supra; See also *Hopper v. United States,* supra.

It is submitted that no unreasonable delegation of legislative authority has been shown here. It would be impossible for Congress to define every organization in which conscientious objectors might be used for forwarding the national health, safety or interest.

Times and conditions change, and necessarily such a program must be flexible to meet the changing needs of the nation.

VI. APPELLANT WAS NOT ORDERED TO WORK IN A GAMBLING HALL.

Appellant argues strenuously that the act and regulation made thereto could be so interpreted as to make possible ordering appellant to work in a gambling hall. The simple answer to this contention is that appellant wasn't. A litigant can be heard to question the constitutionality of a statute only when and insofar as he at least claims to be damaged by its operation. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450; *Atherton v. United States* (9th Cir.), supra.

Conceivably, there could be some instances where the local boards acted contrary to, or without, or in excess, of the power granted to them by the statute and regulations made in pursuance thereof. The fact, however, that the administrative agency could conceivably exceed its authority has never been an argument for denying agencies authority. Appellant was ordered to work for the Los Angeles Department of Charities. There is no evidence that that organization conducts any other activities besides those of a charitable nature. It was not an unreasonable assumption for the local board in this case to decide that charity is in the national interest. See *Penor v. U.S.* (9th Cir.), supra.

CONCLUSION.

The evidence before the District Court established that appellant refused to work for the government in his own city or anywhere else (File 172). His primary reason was that he felt he was being forced into an unsavory job and he saw no value in the jobs offered (File 104). The inference presented to the District Judge was that appellant considered charity work beneath him because of his ability and training as a lath worker.

The United States submits that appellant has shown no legal excuse for his failure to report for work as ordered, and we, therefore, request that the judgment of the District Court be affirmed.

Dated, San Francisco, California,
December 27, 1954.

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